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No. 99-929

IN THE

Supreme Court of the United States

REBECCA McDOWELL COOK,

Petitioner,

v.

DONALD J. GRALIKE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE U.S. PIRG EDUCATION FUND IN SUPPORT OF PETITIONER

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Interest of Amicus Curiae

The U.S. PIRG Education Fund submits this brief in support of Petitioner.[1] Pursuant to Supreme Court Rule 37.3(a), this brief is accompanied by written consents from all parties.

The U.S. PIRG Education Fund is a non-profit, non-partisan organization that conducts research and public education on issues that affect the public interest. The U.S. PIRG Education Fund is affiliated with U.S. PIRG and the state Public Interest Research Groups, including Missouri PIRG. The PIRGs conduct advocacy and research on public interest issues at the federal and state level, including public health, environmental and consumer protection, higher education, and promoting good government.

The PIRGs support political reform to make government accountable to ordinary citizens. Government by the people, while not flawless, is inherently better than rule by enlightened elites and is not only more likely to yield a political process that serves the public interest but is

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[1] This brief has been authored entirely by counsel for the U.S. PIRG Education Fund. No person or entity other than the U.S. PIRG Education Fund has made any monetary contribution to the preparation or submission of this brief.

essential to the ideals of freedom and democratic self-government.

Neither the U.S. PIRG Education Fund nor the state PIRGs have a position regarding the limitation of terms for members of Congress. Our interest in this case lies in preserving U.S. citizens' inherent rights to instruct their elected officials as to how they wish them to act and to be well informed as to how elected officials have carried out those instructions. That right is jeopardized by the Eighth Circuit's ruling.

The U.S. PIRG Education Fund has a deep appreciation for the use of voter instruction and ballot notation at critical points in our country's history, and we generally support this process as a critical tool that citizens need to engage in meaningful representative democracy. In addition, the PIRGs have considered using similar methods to express the will of the people regarding issues that PIRGs work on, and to inform the electorate regarding the actions of candidates and incumbents. We would like to preserve our ability to use ballot notation in the future. In particular, the PIRGs support the passage of a constitutional amendment regarding campaign finance reform, and we are familiar with the difficulties in persuading members of Congress to adopt structural reforms that are contrary to their own self-interests.

PIRGs have also supported ballot notation in the past to promote behavior by elected officials that voters believe to be in the public interest. In 1996, Colorado PIRG, Colorado Common Cause, and the Colorado League of Women Voters supported a ballot question, known as Amendment 15, that expressed the will of the citizens of Colorado that candidates for state legislature abide by voluntary spending limits and used ballot notation to inform voters of which candidates had not complied with the limits. Specifically, in the interest of "encouraging voluntary spending limits," Amendment 15 called for each primary and general election ballot to "clearly indicate which state candidates have accepted the applicable spending limit and which state candidates have not accepted the voluntary spending limit." Although this provision has since been removed by the legislature, if this Court were to uphold the Eighth Circuit's ruling, it would have an adverse impact on the PIRGs' ability to support similar legislation in other states.

Summary of Argument

1.a. The Missouri Initiative Amendment did not violate the First Amendment because, contrary to the characterization of the opinion below, the State of Missouri's role regarding the initiative measure was viewpoint-neutral. All Missouri did was to allow its electoral machinery to be used by

initiative measure, regardless of viewpoint. Consequently, Missouri's role vis-a-vis the term limits measure was analogous to the University of Wisconsin's role in Board of Regents of University of Wisconsin System v. Southworth, 120 S.Ct 1346 (2000) and met the standard of viewpoint neutrality for the same reasons the University of Wisconsin's role met that standard vis-a-vis the mandatory student activity fee.

b. The Missouri Initiative Amendment did not improperly compel Congressional candidates to address the issue of term limits. If candidates felt compelled to address the issue, the feeling derived from the vote of their constituents -- a perfectly legitimate form of compulsion for a public official to experience in a democracy.

c. Contrary to the impression created by the opinion below, the ballot label device was not devised by Missouri state officials as a means of biasing Congressional elections. The device was rather proposed by the non-governmental authors of the initiative petition and subject to open debate in the electoral campaign on the Initiative Amendment.

d. The ballot label did not impose an unanswerable sanction. Resourceful candidates could turn such labeling into an electoral asset.

e. While the First Amendment prohibits states from improperly restricting a candidate's ability to present ideas to the voters, the Missouri Initiative Amendment did no such thing. The Initiative Amendment was rather a perfectly appropriate means of communication by the voters.

2. Contrary to the characterization in the opinion below, the Initiative Amendment did not "establish . . . a regime in which a state officer . . . is permitted to judge and punish members of Congress for their legislative actions." All Missouri did was to allow the voters to use the mechanisms of state government to communicate the voters' views. This was plainly not a violation of the Speech and Debate Clause.

3. Unlike the Arkansas term limits measure struck down by U.S. Term Limits v. Thornton, 514 U.S. 779 (1995), the Missouri Initiative Amendment cannot be properly characterized as a self-executing limitation on terms of office. On the contrary, the Missouri measure respects the holding in U.S. Term Limits v. Thornton, implicitly regarding it as the reason it was necessary for the voters of Missouri to express their views on a prospective Constitutional amendment imposing Congressional term limits. Therefore, the Missouri measure plainly did not violate the Qualifications Clause.

4. The Missouri Initiative Amendment did not violate Article V of the United States Constitution. The Missouri Instruct-and-Inform measure was rather a perfectly appropriate means for voters to participate in the Article V amendment process, with deep historical roots in the periods before, during and after the framing of the Constitution, and in the events leading to the passage of the Seventeenth and Nineteenth Amendments. Further, given that incumbent Congressmen can be expected to view the right to run for re-election as a right which it is in their self-interest to retain, and given that our political system makes it inherently difficult to amend that right without Congressmen themselves participating in the effort to amend, means available to voters to bring pressure on Congressmen to act against their perceived self-interest and in the public interest, such as the Missouri Initiative Amendment at issue here, should be treated with deference. Decisions finding such means unconstitutional, such as the opinion below, should be regarded with skepticism.

Argument

Preliminary Statement

In his concurring opinion in Nixon v. Shrink Missouri Government PAC, 120 S.Ct. 897, 910 (2000), Justice Breyer observed that in "a case where constitutionally protected interests lie on both sides of the legal question,"

> there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words "strict scrutiny."
>
> 120 S.Ct. at 911.

"Nor," stated Justice Breyer,

> can we expect that mechanical application of the tests associated with "strict scrutiny" -- the tests of "compelling interests" and "least restrictive means" -- will properly resolve the difficult constitutional problem that campaign finance statutes pose.
>
> Id.

Like cases involving campaign finance statutes, the present case is one "where constitutionally protected interests lie on both sides of the legal

question[s] presented." Because the Eighth Circuit's opinion failed to appreciate this sufficiently, it found Missouri's Congressional Term Limits Initiative Amendment (the "Missouri Initiative Amendment") unconstitutional by mechanically applying four tests which did not properly apply to the case at hand. In doing this, the opinion below focused simply on applying the tests -- tests which virtually guaranteed the conclusion of unconstitutionality -- when what the opinion should have been doing was analyzing more closely and precisely the competing constitutionally protected interests at stake.

This brief will show that when such an analysis is performed, it becomes apparent that the Missouri Initiative Amendment was an eminently appropriate exercise of the constitutionally protected right of Missouri's electorate to "communicat[e]" (Kimble v. Swackhamer, 439 U.S. 1835, 1387 (1978) (Rehnquist, J., Circuit Justice)) with both their representatives in Congress, and their fellow citizens.

I. THE MISSOURI INITIATIVE AMENDMENT DID NOT VIOLATE THE FIRST AMENDMENT.

The First Amendment analysis in the opinion below was fatally defective.

First, the opinion incorrectly viewed the Initiative Amendment as a "content-based," "viewpoint-specific" regulation of speech imposed by the State of Missouri. A. 11. In fact, the State of Missouri's role was entirely content- and viewpoint-neutral. All that Missouri did was to allow its electoral machinery to be employed by the proponents of the Congressional Term Limits Initiative Amendment as Missouri's content-neutral and viewpoint-neutral laws regarding initiatives required the State to do. Therefore, there is a direct analogy between the facts here and the facts in Board of Regents of University of Wisconsin System v. Southworth, 120 S.Ct 1346 (2000).

Speaking of the "mandatory student activity fee" used in part by the University of Wisconsin "to support student organizations engaging in political or ideological speech" (120 S.Ct 1349), this Court observed that:

> The University's whole justification for fostering the challenged expression is that it springs from the initiative of the students, who alone give it purpose and content in the course of their extracurricular endeavors.

This Court reasoned that because "the challenged speech" was not "financed by tuition dollars" and because "the University and its officials" were not "responsible for its content," the "government

itself" was not "the speaker." 120 S.Ct at 1354. Accordingly, the Court upheld the mandatory student activity fee program, concluding that it met the "standard of viewpoint neutrality." Id.

What this Court stated regarding the University of Wisconsin's mandatory student activity fee program applies with equal validity here. Missouri's "whole justification" for the Congressional Term Limits Amendment was that the people of Missouri themselves placed the Amendment on the ballot through the use of an initiative petition, and directly approved the Amendment themselves at an election. The initiative petition campaign was not financed by state taxes and the state government of Missouri and its officials were not responsible for the petition's content, or for the fact that it won the support of the voters. Accordingly, just as in the University of Wisconsin case, "the government itself" was not "the speaker." Had Missouri's voters filed an initiative petition taking precisely the opposite position on the issue of Congressional term limits, or addressing a different issue entirely, the response of Missouri's government in facilitating the submission of the petition to the voters, and in carrying out whatever the voters decided at the election, would have been precisely the same. Thus, Missouri's role was indeed content- and viewpoint-neutral.

Second, the Eighth Circuit's opinion incorrectly construed the Initiative Amendment as improperly "compelling" candidates "to speak about term limits." A. 8. In arriving at this construction, the opinion below failed to take adequate account of the respective roles envisioned by First Amendment jurisprudence for voters and public officials (and would-be public officials) in discourse upon the officials' (and would-be officials') political conduct.

a. In our system of government, there is not simply "the right" but the "duty" to criticize the conduct of public officials. New York Times Co. v. Sullivan, 376 U.S. 254, 268 (1964). Indeed, "public men [and women], are, as it were, public property." Beauharnais v. Illinois, 343 U.S. 250, 263 n.18 (1952).

b. Every public official is expected to know this. American politics is not for the faint of heart. Indeed, our system goes out of its way to invite harsh criticism of public conduct by constitutionally precluding defamation suits by public officials even on the basis of demonstrably false accusations so long as the accusations are not knowingly or recklessly false. New York Times v. Sullivan, supra. And public officials are themselves invited to speak with brutal candor by the doctrine which makes a public official absolutely immune from defamation suits by private citizens predicated on statements made by

the official even "within the outer perimeter" of his duties. Barr v. Matteo, 360 U.S. 564, 575 (1964).

c. Next to scandalously false defamation by, for example, a television program seen by millions, the accurate reporting in a ballot label of a Congressman's voting record on term limits, even assuming arguendo that the reporting is phrased in such a way as to convey a "negative impression" (A. 9), is relatively benign. Indeed, it is far too benign to be accurately characterized as improperly coercive. This is especially true where, as here, the official or would-be official has been given advance warning of the ballot label, and knows that the ballot label is appearing as the direct result of an initiative measure approved by the electorate.

d. Finally, given our system of government, no official or would-be official is in a position to complain about feeling compelled by the outcome of an election. On the contrary, an official should feel compelled to address, and take into account, such expressions of the popular will. After all, First Amendment jurisprudence was designed to advance the ideals of our democratic political system, not the other way around. As this Court stated in New York Times v. Sullivan, 376 U.S. 254, 269 (1964),

> The constitutional safeguard [of freedom of expression] . . . "was fashioned to assure

> unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." Stromberg v. California, 283 U.S. 359, 369.
>
> (emphasis added)

Third, in criticizing the ballot labels on the ground that they are worded "pejorative[ly]" (A. 9), are "particularly harmful because they appear on the ballot, an official document produced by the state" (A. 10) and, moreover, "appear at the critical instant of voting, during which the labeled candidate cannot contact the voter to defend himself or herself against the label" (A. 10 n.6), the opinion below failed to take into account that all of these attributes of the ballot labels were subject to debate and public scrutiny in the election campaign on the Initiative Amendment. Thus, the opponents of the Amendment were free to argue to voters that even if they were in favor of Congressional term limits, they should vote against the proposed Amendment on the ground

that the ballot labels were an unfair way of advancing their position. Contrary to the impression created by some of the language in the Eighth Circuit's opinion, the ballot labels were not devised by state officials as a means of biasing the election of Congressmen by springing derogatory ballot language on Congressional candidates at the last moment. The ballot labels were rather themselves part and parcel of the Initiative Amendment, drafted by the non-governmental authors of the initiative petition, debated in the campaign on the Initiative Amendment, and devised to take effect no earlier than the next Congressional election. If the respondents in this case had a grievance about the ballot labels, it was a grievance not with the State of Missouri but with their fellow Missourians.

Fourth, the opinion below overstated the nature and severity of the "sanction" imposed by the ballot label. A. 10. The opinion reads as if a Congressional candidate would necessarily be bereft of any effective way of dealing with "the political consequences associated with being labeled on the ballot." A. 10. This seriously underestimates the resourcefulness and ingenuity of American politicians. It is actually not hard to imagine how a Congressional candidate could turn the ballot label into a badge of honor, a proof that the candidate had had sufficient courage to vote his or her conscience notwithstanding the

knowledge that this would put a label next to his or her name on election day.

Fifth, the opinion below completely misconceived the First Amendment rights of political candidates. A. 10-11. In support of its conception, the opinion cited Brown v. Hartlage, 456 U.S. 45 (1982). But Brown addressed the situation where "a State seeks to restrict directly the offer of ideas by a candidate to the voters . . . ." 456 U.S. at 53. The present case involves no such restriction. The Missouri Initiative Amendment does nothing to interfere with or restrict in any way what a Congressional candidate wishes to say to the voters of Missouri. To be sure, the Initiative Amendment constitutes a strong expression of views by the Missouri electorate -- an expression so strong that the candidate may well feel that it is politically perilous not to respond to it. But this is precisely the way American democracy is supposed to work; political candidates are supposed to be responsive to their constituents' expression of views. Thus, by ruling in effect that candidates should not be "imposed upon" by their constituents in this way, the opinion mistook the optimal operation of our political system for its opposite.

II. THE MISSOURI INITIATIVE AMENDMENT DID NOT VIOLATE THE SPEECH AND DEBATE CLAUSE.

The opinion below characterized the Missouri Initiative Amendment as

> establish[ing] a regime in which a state officer -- the secretary of state -- is permitted to judge and punish members of Congress for their legislative actions or positions.
>
> A. 15.

This is a gross misreading of the facts. As discussed above, the Initiative Amendment expressed the views of the electorate. If the electorate had approved an initiative measure taking the opposite position on Congressional term limits, the Missouri Secretary of State would have been required to act in accordance with that opposite position. Thus, all Missouri's initiative apparatus was doing was allowing the voters to use the mechanisms of state government to communicate the voters' views. Far from being a violation of the Speech and Debate Clause, the Missouri Initiative Amendment at issue here was a form of communication by the voters to their representatives, and was, accordingly, in the best tradition of American democracy.

III. THE MISSOURI INITIATIVE AMENDMENT DID NOT VIOLATE THE QUALIFICATIONS CLAUSE.

The opinion below ruled that the Missouri Initiative Amendment represented "an indirect attempt to add a qualification to those listed in the Qualifications Clause" (A. 18) in direct violation of U.S. Term Limits v. Thornton, 514 U.S. 779 (1995). A. 16-18. This ruling misread the facts and misread U.S. Term Limits v. Thornton.

First, unlike the Arkansas term limits measure -- a measure that denied a place on the ballot to any Congressman who was seeking to be elected to a term of office beyond the number of terms specified in the measure -- the Missouri Initiative Amendment can, in no sense, be fairly characterized as a self-executing limitation on terms of office. On the contrary, far from seeking to evade the holding of U.S. Term Limits v. Thornton that Congressional term limits can be imposed only by an amendment to the United States Constitution, the Missouri Initiative Amendment respects that holding and implicitly regards it as the reason why it is necessary for the voters of Missouri to express their views on such a prospective federal Constitutional amendment.

Second, the effort by the opinion below to characterize the Missouri Initiative Amendment as being an unfair means for seeking the end in

question, simply does not ring true. The opinion's claim (A. 18) that it is somehow the ballot labels themselves that pose a dire political risk to Congressional candidates from Missouri who do not support Congressional term limits, seriously underestimates the sophistication of voters and Congressional candidates alike. In actuality, what poses the political risk is not the ballot labels but the vote of 57 percent of the Missouri electorate in favor of the Initiative Amendment. The worry for a Congressional candidate is not that the labels will defeat him or her but the voters who expressed their strong support for term limits by approving the Initiative Amendment. Clearly, a Congressional candidate who opposes term limits will fear that unless the candidate persuades voters to change their view of term limits, or to regard the candidate as worthy of election notwithstanding the voters' disagreement with the candidate on that one issue, the candidate will lose the election. But there is nothing undesirable about such fear; candidates <u>should</u> fear the risk of losing an election on account of disagreement with the candidate's prospective constituents on important issues.

IV. THE MISSOURI AMENDMENT <u>DID NOT VIOLATE ARTICLE V.</u>

The opinion below based its ruling that the Missouri Initiative Amendment violated Article V of

the United States Constitution on the extraordinary proposition that, under the Constitution,

> the people are not to play a direct role in the Article V amendment process.
>
> A. 22 n.12.

First, there is nothing in Article V that says this, and nothing in the decisions of this Court that would support such a sweeping and anti-democratic proposition. Especially given the Constitution's Preamble, and Amendments IX and X, a far more reasonable interpretation is that the people are expected to play whatever role in the amendment process they want to play so long as such role is not expressly prohibited. Surely, there is no express prohibition in the Constitution against the type of initiative measure approved by the voters of Missouri here.

Second, as University of Missouri law professor Kris W. Kobach has demonstrated in his scholarly work, and in the amicus brief he is submitting to this Court, the type of Instruct-and-Inform measure approved by the voters of Missouri has strong historical roots in the periods before, during and after the framing of the Constitution, and in the events leading to the passage of the Seventeenth and Nineteenth Amendments to the Constitution.

Third, as was the case with the passage of the Seventeenth and Nineteenth Amendments, direct voter involvement is essential when the reform sought is a reform against the vested interests of the voters' elected representatives. What Justice Kennedy said in his dissenting opinion in Nixon v. Shrink Missouri Government PAC, 120 S.Ct 897, 914, 915 (2000) regarding the type of decision of this Court which, by its nature, insulates itself from correction in the political process, applies with equal force to those features of our Constitutional system which, by their nature, tend to be insulated from correction in the political process. Those attributes of the electoral process which incumbent Congressmen would naturally regard as being at least in some part responsible for their election or their political power, such as the method of election (cf. the Seventeenth Amendment), the extent of the suffrage (cf. the Nineteenth Amendment), the means of financing election campaigns, the advantages of incumbency and the right to run for re-election, constitute perhaps the prime example of features of our political system which tend to be insulated from correction or amendment in the political process. This is because such correction or amendment cannot come about without the Congressmen themselves acting against their perceived self-interest, something which Congressmen, and people in general, are loathe to do. Accordingly, attributes of the electoral process, such as the right to run for re-election that was the subject of

the Missouri Initiative Amendment, must, in Justice Kennedy's words,

> never be viewed with more caution than when they provide immunity from their own correction in the political process and in the forum of unrestrained speech.
>
> 120 S.Ct at 915.

And, for the same reason, means to correct or amend such attributes of the electoral process, such as the Missouri Initiative Amendment at issue here, should be treated with deference, and decisions finding such means unconstitutional, such as the Eighth Circuit's opinion below, regarded with skepticism.

Conclusion

The judgment of the Court of Appeals for the Eighth Circuit must be reversed.

Dated: June 2000

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